

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT D. CHUDOMELKA, II,
Plaintiff,

vs.

GRANT COUNTY JAIL, LT. KERRI
ADLER, OFFICER RAY
HARRINGTON, and OFFICER
SCOTT MYERS,
Defendants.

NO. CV-07-010-LRS

**ORDER GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

BEFORE THE COURT is Defendant Kathleen Holloway's Motion for Summary Judgment, Ct. Rec. 29, filed on February 26, 2008; and Defendants Kerri Adler, Grant County Jail, Ray Harrington, and Scott Myers' Motion for Summary Judgment, Ct. Rec. 42, filed May 27, 2008. Plaintiff, proceeding *pro se*, has failed to file a response to either summary judgment motion despite the Court granting Plaintiff's request for a 30-day extension of time on May 13, 2008. Ct. Rec. 41.

PLAINTIFF'S FAILURE TO FILE OBJECTION TO MOTIONS

In general, under Local Rule 7.1(h)(5), a party who fails to file a timely objection to a motion is deemed to have waived objection. It is well-established law in this circuit, however, that Federal Rule of Civil Procedure 56 requires the Court to examine the merits of a

1 motion for summary judgment even though a nonmoving party fails to
2 object as required by Local Rule 7.1. *See Henry v. Gill Industries,*
3 *Inc.*, 983 F.2d 943 (9th Cir. 1993) (local rule that requires entry of
4 summary judgment simply if no papers opposing motion are filed or
5 served, and without regard to whether genuine issues of material fact
6 exist, would be inconsistent with summary judgment rule and, thus,
7 would violate federal rule that allows local rules only if they are
8 "not inconsistent" with federal rules).

9
10 **DEFENDANT HOLLOWAY'S MOTION FOR SUMMARY JUDGMENT**

11 Plaintiff's claims against Ms. Holloway, a Physician Assistant,
12 arise out of medical care and treatment she provided to the plaintiff
13 while he was incarcerated at the Grant County Jail in Ephrata,
14 Washington. In the State of Washington, all claims for damages
15 arising out of health care must be asserted under RCW 7.70. In 2006,
16 the Washington Legislature amended RCW 7.70 to require pre-suit notice
17 of claim to the health care provider:

18 No action based upon a health care provider's
19 professional negligence may be commenced unless
20 the defendant has been given at least ninety days'
21 notice of the intention to commence the action.
22 The notice required by this section shall be given
23 by regular mail, registered mail, or certified
24 mail with return receipt requested, by depositing
25 the notice, with postage prepaid, in the post
26 office addressed to the defendant. . . .

27
28 RCW 7.70.100(1).

Plaintiff did not serve a pre-suit notice on Ms. Holloway as
required under the statute. Furthermore, Plaintiff did not file a

1 Certificate of Merit as required by RCW 7.70.150.¹ As a result,
2 Defendant Holloway's motion for summary judgment is granted and
3 Plaintiff's claims against Ms. Holloway are hereby dismissed based on
4 these procedural deficiencies.

5
6 **REMAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

7 With respect to the claims against the remaining Defendants,
8 Grant County Jail, Lt. Adler, Officer Harrington and Officer Myers,
9 Plaintiff alleges that he was denied proper medical care and that he
10 was the victim of excessive force. Based on the Statement of
11 undisputed facts in support of the instant summary judgment motion,
12 there is no evidence that Plaintiff's injuries were caused maliciously
13 or sadistically. Whitley v. Albers, 475 U.S. 312, 320-21 (1986).

14 There is no question that the jail was experiencing a riot and
15 plaintiff, whether actively participating or not, was in the area of
16 the rioters and not locked down as requested. Declaration of Adler,
17 ¶7. The force used by Defendants was reasonable and according to
18 their training. There is simply no evidence of sadistic or malicious
19 behavior. Plaintiff received an elbow injury when he tripped over his
20 mattress that another inmate had left on the floor. Plaintiff states
21 that he also hit his elbow on a door frame when being led out of a
22 cell. Plaintiff admits in his deposition, however, that the officers
23 did not intend for him to hit his elbow. Plaintiff's Deposition, p.
24

25
26 ¹RCW 7.70.150(5)(a) reads: Failure to file a certificate of merit
27 that complies with the requirements of this section is grounds for
28 dismissal of the case.

1 26.

2 Finally, the undisputed facts indicate that there is no evidence
3 that jail officials were deliberately indifferent to a serious medical
4 need. The evidence reveals that the Defendants did not even know of
5 an "excessive risk" to Plaintiff's health. The undisputed facts
6 indicate that Plaintiff didn't inform the jail of his condition until
7 seven (7) months after the fact. Further, jail personnel had watched
8 plaintiff lifting weights prior to the first grievance concerning
9 medical care. There was nothing in his behavior to suggest a serious
10 medical condition. Plaintiff received access to medical care whenever
11 he requested it. See Adler Decl.; Plaintiff's Deposition Excerpts.
12 There is no evidence that medical personnel were negligent in their
13 treatment of the Plaintiff or even "deliberately indifferent." See
14 Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1988); *Farmer v.*
15 *Brennan*, 511 U.S. 825, 835 (1994). As such, and according to case
16 law, Plaintiff's claim fails.

17 **CONCLUSION**

18 Plaintiff has failed to file a response despite an extension
19 granted by the Court to do so. Pursuant to Local Rule 7.1 (h)(5), the
20 failure to timely file a memorandum of points and authorities in
21 support of or in opposition to any motion may be considered by the
22 Court as consent on the part of the party failing to file such
23 memorandum to the entry of an Order adverse to the party in default.
24 The Court, having reviewed the moving papers filed by Defendants,
25 finds that the Motions for Summary Judgment should be granted for
26 substantive reasons as well.

1 Accordingly,

2 **IT IS ORDERED:**

3 1. Defendant Kathleen Holloway's Motion for Summary Judgment,
4 **Ct. Rec. 29**, filed on February 26, 2008 is **GRANTED**.

5 2. Defendants Kerri Adler, Grant County Jail, Ray Harrington,
6 and Scott Myers' Motion for Summary Judgment, **Ct. Rec. 42**, filed May
7 27, 2008 is **GRANTED**. Plaintiff's claims against all Defendants are
8 **DISMISSED with prejudice**.

9 **IT IS SO ORDERED.** The District Court Executive is directed to
10 enter this Order and shall forward copies to counsel and the
11 Plaintiff. The Clerk shall enter judgment consistent with this order.

12 **DATED** this 8th day of July, 2008.

13
14 ***s/Lonny R. Suko***

15 _____
16 LONNY R. SUKO
UNITED STATES DISTRICT JUDGE